RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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TABLE 8.10. *Probit estimates of going to court in civil, economic, and administrative cases*

	Civil		Economic		Administrative	
Number of strata (24)		24		24		24
Number of PSUs (counties)		100		100		100
Number of observations		7160		7160		7160
Estimated population size (millions)		850		850		850
Prob > c		0.0000		0.0000		0.0000
Control for Actual Disputes						
Civil dispute	−0.841	***	–		–	Civil
Economic dispute	–		−0.862	***	–	
Administrative dispute	–		–		−1.062	***
Human Capital & Information						
Formal education (years)	0.023	**	0.030	***	0.020	***
Legal knowledge score	0.061	***	0.044	***	0.056	***
Television	0.119	***	0.052	**	0.076	**
Political & Social Capital						
CYL member	0.172	***	0.130		0.005	
CCP member	0.229	***	0.189	**	0.102	
Contact w/ party or gov. cadre	0.055		0.091	*	0.063	
Contact w/ legal or public security official	0.225	***	0.174	***	0.162	***
Contact w/ People's Congress	0.084		0.050		−0.001	
Contact w/ lawyer	0.131		0.191	**	0.017	
Contact w/ Legal Aid Bureau	0.038		−0.181	*	−0.176	
Contact w/ labor union	0.030		0.129	*	0.047	

Diffusion Variables						
Trustworthiness of courts	0.177	***	0.252	***	0.208	***
Share of court adopters in township						
Civil cases	5.903	**	–		–	
Economic cases	–		5.845	!	–	
Administrative cases	–	–	3.717			
Demographic Variables						
Age	0.006		0.008		−0.024	**
Age-squared	0.000		0.000		0.000	*
Female	−0.019		−0.026		0.105	**
Han nationality	−0.016		0.008		−0.102	
Urban registration	0.334	***	0.123		0.148	*
Full-time farmer	−0.040		−0.098		−0.041	
Constant	−1.548	***	−1.356	***	−1.133	***
LR test of full vs. nested model without diffusion variables (unweighted probit with 7160 observations)						
LR c	102.61		131.33		112.15	
Prob c	.000		.000		.000	

Notes: Because only one PSU was draw in small provinces, the original strata are grouped in 24 postestimation strata. ! = significant at the 0.108 level. Insignificant coefficients are shaded in gray. Linearized variance estimates account for complex multistage survey design effects, with stratification, first; stage selection of PSUs (counties), and second-stage selection of SSUs (townships). These calculations ignore design effects at and below the third stage. Coefficients and standard errors shaded in gray are not significant at the 0.1 level.

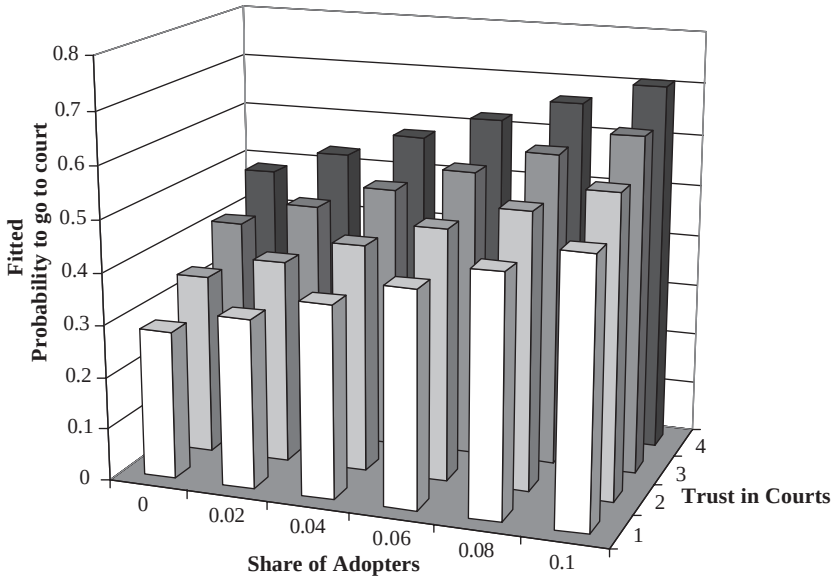

FIGURE 8.7. Fitted probability of adopting the court in future civil disputes. *Note:* All other variables are held at their mean values.

the dynamics of diffusion presented in Table 8.2 seem to hold very well for civil disputes. The propensity to go to court varies across individuals and communities as a function of these parameters. Varying these parameters and holding all other variables at their sample mean yield a more intuitive picture of the substantive impact of these variables (see Figure 8.7). The findings in diffusion research obtained through simulations that small idiosyncrasies in a network can have large behavioral consequences apply here as well: even a small share of adopters of the courts in a community greatly increases the likelihood that other members of the same community will in turn adopt the same behavior.

It is also obvious that the rate of diffusion (measured as the fitted probability of going to court in a civil dispute) varies across communities systematically. Since the ILRC is a national sample stratified by province, it is legitimate to compare findings across provinces where the number of primary sampling units is not too small, though of course variance estimates within provinces are larger than the sampling variance of indicators measured at the national level: we forecast more rapid diffusion in Beijing in the case of civil disputes than anywhere else in the country, but this finding should be interpreted with caution because Beijing's contribution to the national sample is small, as it should be, given the size of the municipality.

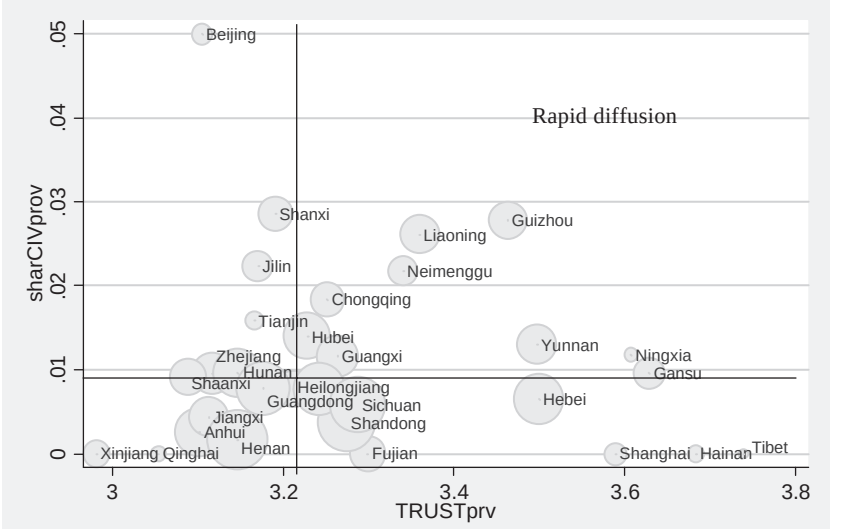

FIGURE 8.8. Trustworthiness of courts and share of adopters, by province. *Note:* Gray circles are proportional to provincial population in 2004. Quadrant boundaries are drawn at the mean of each variable.

If we separate the points on the scatterplot of average levels of trust and shares of court adopters in civil cases into four quadrants, the upper-right corner of the figure represents the set of provinces where we expect rapid diffusion, since both the level of trust and the share of court adopters are higher than the national average (see Figure 8.8). With the exception of Liaoning, all of the cases in the quadrant represent relatively poor, hinterland provinces. Most coastal provinces that have benefited the most from economic reforms since 1978 belong instead to the intermediate quadrants, where one of the two factors conducive to diffusion takes a low value. Three large interior provinces (Henan, Anhui, and Jiangxi) are especially noteworthy for their low values on both scores. Overall, there seems to be no systematic relationship between the level of economic development and the likelihood of diffusion of judicial institutions.

The rarity of court adopters in economic and administrative cases relative to civil ones also suggests that the institutionalization of the courts is likely to occur only through the process of civil dispute resolution. The novelty of administrative litigation, which only began in earnest in the 1990s (the Administrative Litigation Law [ALL] was passed in 1989), and the low rate of success of citizens who sue government agencies will defer the diffusion of the habit of "suing the state" in court in the more distant future. Currently, the

odds of finding satisfied ALL litigants in a given community are simply too remote to have any detectable impact on community behavior.

The Impact of Individual-Level Variables

Two variables alone cannot explain the popularity of the courts in China. The individual characteristics of the respondents also play an important role in the decision to adopt or reject an institutional innovation. Some of these factors are not specific to authoritarian regimes: education and legal knowledge are often cited as important conditions of access to the legal system in democracies as well. Other individual characteristics are more regime-specific, such as membership in the Communist Youth League or the Communist Party.

Social Ties

The diffusion process that we examined so far focuses on networks linking actual adopters of an innovation to potential adopters. However, other types of social ties can also affect the propensity to adopt an innovation, such as *guanxi* ties. Citizens with privileged access to the political and administrative elite can gain valuable information and perhaps even mobilize these ties to manipulate the institution to their advantage. There is indeed evidence that the value of ties with employees of the judiciary varies systematically with the nature of the disputes. As is true with the effect of adopters in the community, the substantive impact of these ties is larger when the disputes are less likely to involve state institutions (i.e., civil disputes), but one's social network is less decisive in administrative cases than in civil disputes where state interests are not threatened.

Party and Youth League Membership

Political connections magnify the impact of these ties: CCP membership systematically increases individual propensities to go to court. In addition, the effects of party seniority are stronger when the issue is less politically charged. Both Youth League and party members are more likely to go to court in civil disputes than nonmembers, but only party members – whose political credentials are stronger than mere CYL members – are willing to go to court in economic and governmental disputes to a lesser extent than for civil disputes. Party members may be reluctant to bring their disputes to court, because such a drastic action may be construed as a breach of party discipline if it involves a conflict with CCP or government officials. However, in economic and – even more so – in civil disputes, the political costs of going to court are likely to be lower and the benefits large: in conflicts with nonparty members, it is to the

party member's advantage to rely on courts that are institutionally dependent on the CCP.

Media Exposure, Education, and Legal Knowledge

Unlike Chen and Shi (2001) who found no evidence of a relationship between media usage and general political trust in China, television viewers in the ILRC sample are more prone to use the court than nonviewers, regardless of the nature of the dispute. This difference may be due to the specificity of the institution considered: contemporary Chinese media broadcast very pointed educational or fictional programs that convey clear messages that propaganda departments are eager to disseminate during legal education campaigns (*pufa jiaoyu*/普法教育). Judges and lawyers embody a stylized modern society that citizens are encouraged to join, and a host of soap operas include characters who see their disputes adjudicated in invariably well-organized and corruption-free courts staffed by righteous judges. Post-Leninist regimes are better equipped than other authoritarian regimes to use the media to their advantage. Once the state has decided to innovate, as the Chinese state has in the area of judicial institutions, its propaganda apparatus can be a highly effective agent of institutional change. Propaganda alone may not be sufficient to convince litigants to return to the courts if they are disappointed after a first experience, but it can at least prime the population of potential first-time users to be favorably predisposed toward judicial institutions. Furthermore, many media organizations test the boundaries of political correctness and do report on legal affairs in a far less stereotypical fashion than in the past, which may further increase the popularity of lawyers, judges, and the courts.

Television programs are particularly important because broadcasts originally intended for provincial audiences are watched nationwide. Satellite dishes usually carry a large bundle (if not all) of provincial stations, in addition to closed-circuit television channels. A farmer from Yunnan can seamlessly learn from documentaries on Shanghai Television, and apply what he has learned on TV in his local community. Of course, formal education and legal knowledge strongly complement the impact of the media in the promotion of the courts. The impact of these factors is large and highly statistically significant across all dispute categories.

CONCLUSION

China's effort to build the rule of law seems paradoxical given the nature of party control over judicial institutions in a post-Leninist state. Stanley Lubman's (1999) metaphor of the "bird in a cage" is a powerful reminder of the

limits of this enterprise. Indeed, the skeptics could point at several empirical findings of this chapter and forecast doom, because key individual-level factors that explain the propensity to use the courts are closely related to the nature of Chinese authoritarianism: exposure to state-owned media, ties to the judicial elite, as well as membership in the Youth League and in the Communist Party all explain why citizens would (and in some cases did) solve their disputes in court. If access to the legal system is restricted to the regime's elite, the legitimacy of Chinese courts could be seriously eroded.

On the other hand, the party facilitates the diffusion of legal knowledge among its members, as well as access to the courts. Party membership and to a lesser extent Youth League membership have a direct and positive impact on the likelihood of going to court in civil and economic cases. To the extent that one of the key goals of Chinese legal reformers is to shift the traditional burden of dispute adjudication away from the party and government agencies to more autonomous courts, party and CYL members seem to be a positive force for change. A reform sequence in which nonparty members would be incited to use the courts while party members would rely on other institutions to solve their disputes would almost certainly weaken the legitimacy of legal institutions among nonparty members. We find no evidence that this is the case. Instead, the CCP enhances access to legal institutions among its members. This is good politics, and is likely to strengthen China's reform effort: if party members receive selective benefits from these institutions, they are more likely to support them in the long run.

The diffusion effects that are noticeable in the ILRC sample are a cause for further optimism. The transaction costs of going to court are high, and a fair amount of social, political, and human capital is required to overcome these costs at this early stage of Chinese legal reforms. If ordinary citizens – who are often deprived of these forms of capital – were to suddenly engage the courts in large numbers, most would lose or give up, and probably turn into cynical and embittered opponents of legal innovations. We are instead witnessing a gradual diffusion process in which rare but satisfied users who probably owe a great deal of their success to their social and political capital help diffuse their experience in the communities in which they live. Local elites may well be one step ahead of the general population, but the benefits that they derive from their close ties to the regime and, with that, their increased odds of success in court, allow the public to learn from positive rather than negative experience, and ensure the gradual but steady diffusion of the institution.

9

Building Judicial Independence in Semi-Democracies: Uganda and Zimbabwe

Jennifer Widner with Daniel Scher

This chapter draws upon African cases to consider the circumstances under which a court can build and maintain a high degree of independence in an authoritarian setting. Trials that uncover corruption in high places, affect electoral fortunes, or cause a political supporter to pay large sums of money often test the willingness to delegate power to a court. In any context, including democracies, executive branches and legislatures may occasionally attempt to infringe judicial independence when there are strong incentives to do so. The issue is, first, whether they succeed in influencing the outcomes of these particular cases, and, second, whether their efforts undermine the ideal of neutral third-party dispute resolution for future controversies. We may be able to learn something about the development of institutional autonomy by comparing country experiences. In highly charged disputes, why do executive branch efforts to influence outcomes end with the judiciary substantially intact in some instances, whereas in others the autonomy of the court from the other branches of government diminishes?

In the context of this discussion, judicial independence means freedom from partisan influence in particular cases. There are many ways in which a determined executive faction may secure the outcomes it wishes short of threatening or firing judges, packing the court, or ousting jurisdiction – the three most spectacular ways to abrogate the independence of the judiciary. Making litigation prohibitively dangerous or expensive is one tactic that does not undermine judicial independence *per se*, though it may erode the integrity of the legal system writ large. Manipulating members of the bar is another common tactic that again brings ill repute upon the legal sector and represents a hidden attack on the judiciary, but does not necessarily trigger concern about the impartiality of the judges themselves. Nonenforcement of judgments and noncompliance are tantamount to attacks upon the court as well.

This chapter treats judicial independence as a deal among key political actors to delegate power to a nonpartisan body. It identifies several points at which such autonomous units in Africa's common law systems are vulnerable. Then it asks why some authoritarian governments decide to dispense with independent courts entirely, whereas others seek to influence a few sensitive cases and leave the rest of the system substantially intact. It compares and contrasts the cases of Zimbabwe and Uganda in this regard and suggests that, while underlying social and economic conditions may increase the probability that independent courts will persist over time, whether initial acts of delegation endure in the short run is highly contingent on the skills of judges and configurations of support and opposition inside executive branches. Although it is therefore difficult to spin general theories about "institutional origins," because of the highly parameter-specific character of the bargains struck and the importance of feedback effects, it may nonetheless prove possible to draw useful adages.

JUDICIAL INDEPENDENCE AS AN EQUILIBRIUM

A variety of motives may inspire a leader to support the delegation of power to a nonpartisan body in the short run. Semi-democratic and authoritarian governments sometimes recognize the advantages of having an independent and effective court system for internal control purposes. For example, when corruption in the lower levels of administration incites popular anger and impedes investment, courts potentially provide a cheaper means to control such transgression than does better supervision. Regular administrative review, a form of "police patrol," is costly in both monetary and political terms. Especially when a state is relatively weak, it may be more sensible to let aggrieved individuals and firms bring their complaints to courts and sound a "fire alarm" (McCubbins and Schwartz 1984) than to try to curtail corruption by other means. Rosberg (1995), Moustafa (2007), and Ginsburg (Chapter 2) have made this point.

There are other reasons why having a court popularly perceived as independent, fair, and effective may make sense. Independent courts may help resolve local disputes that might otherwise end up in the street. If lower ranks of the ruling party are on the take or locked in conflict, then the judgment of a neutral third party may do less political damage to the head of state than intervention by the party leadership. Second, in a period when international norms vest great significance in "rule of law," allowing courts greater institutional autonomy may also signal "good international citizenship," which facilitates candidacy for accession into regional arrangements or eligibility

for foreign assistance. On occasion an authoritarian government also might invest in independent courts to distinguish itself from its predecessors, who themselves abused the rule of law.

Willingness to delegate power to an independent court tends to be fairly ephemeral, however. "Political will" rarely takes the form of a fixed commitment. An independent court may prove extremely inconvenient when a corruption case involves a major political ally or someone who can command armed gangs or militias. An independent court may also prove threatening when there is a serious contender in a presidential election, and both the head of state and his entourage face the prospect that they might lose control of office and patronage resources. Multiparty elections may create a constituency for an independent court (the opposition politicians), but they also create a period of high challenge and increase the temptations to intervene. Under these pressures, some rulers will try to dispense with the whole institution. Threats, attacks against judges, court packing, nonrandom transfers, salary reductions, refusal to produce people who have been jailed, changing outcomes after the fact through manipulation of registries, and ouster of jurisdiction are all part of the response repertoire.

How does a temporary delegation of power become a long-term commitment? The courts have neither the power of the purse nor the power of the sword. They cannot easily defend themselves. Thus, one circumstance in which independent courts are more likely to endure is when there are clear constituencies, not only among the members of the bar but also within important parts of the society – business groups and opposition politicians, for example. A second is where actions attract considerable international attention and where a departure from international norms may result in criticism or a reduction in aid. A third is where the complex of norms supportive of the rule of law generally has shaped the attitudes of the political class or of a significant and active segment of public opinion. Public outrage may be a significant deterrent in countries sufficiently stable that the medium-range and longer term matter in the politician's calculus. A fourth circumstance, more quixotic and idiosyncratic, is one in which the members of the court are simultaneously able to appease and draw some lines, as in *Marbury*. This strategy may well be short term, but the successive negotiation of crises may give public opinion and solid constituencies time to form.

A TALE OF TWO COURTS

A comparison of Uganda and Zimbabwe may help elucidate the conditions under which a court in an authoritarian system can begin to anchor a

temporary delegation of independent decision-making power and foster the growth of institutional independence. Uganda and Zimbabwe are both nominally multiparty systems, but neither is a liberal democratic polity. In both instances, the sitting president took power in a rebel struggle and later stood for election in an imperfectly managed contest. The president's entourage grew to include people who personally benefited from access to the public treasury and sought to preserve their positions. Both countries had independent upper-tier courts as their stories open, and both governments tried to intervene when a relatively serious presidential contender appeared. The passages in their constitutions regarding the judiciary are almost identical for the two cases.

As in most accounts of strategic interaction, the details matter; hence the stories are complex. In both instances, politically sensitive issues and judgments provoked a crisis in the relationship between an independent court and the executive. In both cases, there were efforts to infringe the independence of the judiciary. Thus each country's story begins with a crisis. The Uganda story, though not closed, ends perhaps more happily, if ambiguously, than the Zimbabwe story . . . for now. The question is what distinguishes the two. What can we learn from the differences?

Uganda: Persistent Ambiguity

Uganda's recent debacle illustrates the partial (perhaps short-lived) repulsion of an effort to dismantle judicial independence. The country's president, Yoweri Museveni, took power through an armed struggle that resulted in the capture of the capital by the National Resistance Movement in 1985. Museveni sought to dislodge a series of notorious autocrats and promised security, roads, respect for human rights, and economic recovery, roughly in that order, in an effort to distinguish himself from his predecessors and appeal to potential investors. By the early 1990s, he had reinstated judges who had fled into exile after harassment under Idi Amin and Milton Obote, or had landed in jail or faced dismissal. He had further sought the help of the international community to build the rule of law by overhauling the constitution, revising statutes, building a more competent and independent public prosecutor's office, and enhancing the effective operation of the courts. The court had demonstrated independence in several ways, including enforcement of norms about reasonable time to trial in criminal cases, thereby eliminating the government's ability to hold people it didn't like indefinitely.

The president had championed a "unity government" or "movement system" instead of political parties, and when multiparty competition became a

reality, forced upon the government by international pressure and a referendum, the enthusiasm of the incumbents for an independent judiciary suddenly came under stress. An effective and fair court system remained important for many purposes, particularly for investment, and as a result many of the classic stratagems of an earlier era –firebombing judges' houses, threatening their children, replacing judges with yes-men – appeared off limits to some in the executive branch, though not to all. Instead, the government turned to several devices historically common in other parts of the world too: abuse of process to harass opponents and ouster of the courts' jurisdiction. Although eventually rebuffed, or at least partly so, the government's actions served as a reminder that, where independent courts endure, they do so only because of a constant quiet struggle.

The story unfolded in several stages. In 2001, Yoweri Museveni's main opposition in the presidential elections came from Kizza Besigye, a man whom he had long known. Besigye had attended Makerere University and obtained a medical degree in 1980. He had joined with Museveni to help found the Uganda Patriotic Movement, which contested the country's 1980 elections. When the party lost, allegedly because of vote rigging by the incumbent, Museveni launched a rebel struggle, while Besigye went to Nairobi to continue his medical training. Two years later Besigye returned to Uganda and joined Museveni, serving as medical officer in the struggle and acquiring the rank of colonel. When the National Resistance Army forced Milton Obote to flee and took power in Kampala, Besigye became Minister of State for Internal Affairs for two years and then Minister of State in the Office of the President and National Political Commissar. He married a woman Museveni had long known, from a family that had hosted him earlier in his life. An engineer, she ran for political office and became a member of Parliament. Besigye was replaced as National Political Commissar and became Commanding Officer of the Mechanised Regiment in Masaka, then Chief of Logistics and Engineering, and finally Senior Military Adviser to the Ministry of Defence until his retirement in October 2000. He also served as a representative of the army in the country's constituent assembly in 1994, an experience that may have shaped his political education. A rift of some sort began to develop between the two men in the mid- to late 1990s, possibly because Besigye believed the nonparty "movement" system should indeed be temporary, as promised, and considered it time to make changes. He was also critical of procurement procedures within the military.

The relationship between the two men grew tenser as a result of the 2001 nonparty elections and became still more difficult as a result of the multiparty competition of 2005–2006. Besigye competed in the nonparty presidential

contest in 2001 and lost to Museveni by a substantial margin, capturing just over a quarter of the vote. Some of his supporters allegedly discussed forming a new rebel opposition. It is not at all clear that Besigye was a party to these conversations, or even that the discussions took place. After the 2001 elections, Museveni sought to eliminate the term limit provisions and pushed a constitutional amendment through the legislature, allowing him to run again. Under international pressure, he also grudgingly sent the decision to move to a multiparty system to a national referendum, as required under the constitution. Thus in the multiparty contest that took place in February 2006, Museveni was again a candidate. Besigye returned from self-imposed exile only a few months before the race, on October 26, 2005, as leader of the Forum for Democratic Change (FDC), which he had helped organize while abroad. He was clearly aware that danger might attend this decision to return. Although he did not immediately declare himself a contestant, one might reasonably have anticipated he would do so.

The political elites surrounding Museveni, especially some of the top military officers, quickly perceived Besigye as a serious threat. They clearly harbored concerns that Besigye could command a significant share of the vote, although it is not evident he could have won. Some may have worried that Besigye, once a military man, might reveal damaging information on the campaign trail about corruption or abuse of power within the army. It is also likely that, for several, democratic politics ran against deeply engrained norms that were intolerant of criticism. Whatever the genesis, the problem for those who felt insecure was to try to limit the threat in ways that would not provoke the ire of donors, who were already alarmed by the political turn in the country. The first volley was launched by Amama Mbabazi, Minister of Defence, who once had simultaneously held the ministerial positions of Defence, Attorney General, and Foreign Affairs.

The government's behavior suggests division about the best strategy to follow to limit opposition. The strategy of one faction within the ruling cabal was to try to initiate a series of court proceedings that would keep Besigye in jail and tie down his campaign. Rumors of impending accusations began to leak out in October, although the Director of Public Prosecutions, Richard Buteera, said he was unaware of any criminal charges against Besigye emanating from his office.[1] On November 14, the Attorney General issued a warrant for Besigye's arrest on grounds of treason, concealment of treason, and rape. Twenty-two others were arrested as well. The government charged that Besigye and others

[1] Reported in *Daily Monitor* and carried by BBC Worldwide Monitoring, October 23, 2005. Accessed through LexisNexis.

had plotted a coup after the 2001 election loss.[2] It also accused Besigye and his supporters of having contact with rebel groups within the country, forming their own People's Redemption Army, and possessing a number of weapons. Finally, it claimed that Besigye had raped a young woman for whom he served as guardian, based on an incident that occurred in 1997, nearly ten years earlier, though it was later revealed that the Director of Public Prosecutions had objected to filing the case. Besigye's arrest sparked riots in Kampala, the capital.

Two days after the arrests, fourteen of Besigye's co-defendants were to appear in court to be considered for a bail hearing. At this point, the new military heavies within the government intervened and broke with the slightly more subtle strategies of the Ministry of Justice. Just before the hearing was due to begin, thirty armed commandos dressed in black jumped out of taxis, entered the court, and tried to force their way to the holding cell. The court security resisted and quickly evacuated the judges from the building. The commandos, later dubbed the "Black Mambas," permitted a group of foreign envoys through the main gates, but blocked the delegation when it tried to reach the holding cell.[3] The defendants refused to accept bail, although so granted, on the belief that if they left the court on their own recognizance they would be rearrested and seized by the military.[4] Civilian prison seemed preferable. The commandos, possibly members of a Joint Antiterrorism Task Force,[5] eventually departed. Justice Edmund Ssempa Lugayizi, who was scheduled to hear the case, withdrew from both the rape and treason cases after the siege.

In the press and the street, the news of the "Black Mambas" became the focus of attention. In an effort to dampen criticism, the government pretended to seize the legal high ground, claimed that the *sub judice* rule meant that no one could speak about a case currently before the court, and banned media discussion of the treason charges. Principal Judge James Ogoola granted temporary bail, but the government continued to hold Besigye and his confederates, and police blocked press access to the bail hearing.

The military faction within the cabal then again broke with the faintly more subtle, if nonetheless egregious strategy pursued by the Attorney General. On November 24, the Military General Court Martial stepped in and charged

[2] "Judge quits Ugandan Opposition Leader's Treason Trial," *Agence France Press*, February 3, 2006. Accessed through LexisNexis.

[3] "Armed Men Disrupt Opposition Leader's Court Case," *Financial Times Information/Uganda Monitor*, November 17, 2005, accessed through LexisNexis.

[4] Human Rights Watch, November 23, 2005 as reported by AllAfrica, Inc. Accessed through LexisNexis, July 2006.

[5] Human Rights Watch, November 29, 2005, accessed through LexisNexis.

Besigye with terrorism. Taking a cue from one of the great powers, Uganda's Parliament had earlier enacted an Antiterrorism Act that permitted suspects to be held indefinitely without charge. The court martial said Besigye and some of his followers planned terrorists acts and had accumulated a variety of weapons to carry out their ambitions. Besigye thus remained behind bars despite the fact that the courts of general jurisdiction had extended him bail. He would be tried in the General Court Martial, according to the government.

The military's ouster of the court's jurisdiction, coupled with the breach of judicial independence committed by the Black Mambas, triggered demonstrations. A number of opposition FDC activists were arrested for planning some of the protests, but were released by a Kampala court two weeks later. The country's lawyers organized their own manifestation of support for the courts. On November 28, four days after the military's action, some of the Uganda Law Society's 800 members showed up outside the High Court to express concern about the deterioration of the rule of law in the country. The Law Society resolved to sue the government over the actions it had taken, and the demonstrators said they would make the court a "no go area" for security forces.[6] On December 2, the High Court ordered a stay of the military trial until the Constitutional Court could rule on the constitutionality of the government's action. Meanwhile, the Constitutional Court issued a 4-1 decision concurring with the Law Society's position.

Members of the court confronted a terrible dilemma about how best to uphold the standards of judicial independence and the rule of law under a severe threat. Chief Justice Benjamin Odoki, who, ten years earlier, had led the constitution-writing process, expressed his concern twice in the immediate aftermath of the events. Principal Judge Ogoola later expressed sharp criticism at a law forum in which he delivered a paper entitled, "Black Mamba Invasion and the Independence of the Judiciary." Acting Chief Registrar Lawrence Gidudu commented that there had been many related incidents since 2001.

Through the months of December and January, a tug of war took place between the judiciary and the Law Society, on the one hand, and the army faction within the executive. The Constitutional Court ruled that the General Court Martial had no jurisdiction. A new judge, John Katutsi, was assigned to hear the cases, and the defense lawyers immediately asked the justice to quash the proceedings on the grounds that the charges did not indicate who plotted with whom and were therefore defective. On December 11, at roughly the same time that a poll put Besigye ahead of Museveni in several key towns around

[6] "Lawyers Strike Over Army Siege," *The Monitor*, November 28, 2005, accessed through Lexis-Nexis.

the country, the president issued a statement defending a military trial. The government accused the courts of playing partisan politics, supporting Besigye by agreeing to take Law Society petitions seriously. The court countered by issuing an order to the Commissioner General of Prisons to produce Besigye in court and to offer an explanation of why he was still being held when he should have been released. It also asked the government to respect the independence of the court, saying, "The judges considered circumstances and the impact of the November 16 siege of the high court by military personnel deployed within the precincts of the court, to re-arrest suspects that the high court had lawfully released on bail, apparently in order to re-charge the same suspects in the General Court Martial."[7]

Still the army failed to release Besigye. On January 17, General Elly Tumwine announced that the court martial would start on the last day of the month. Precisely on the 30th, the Constitutional Court ruled 4-1 on the Law Society petition, which claimed that the army was not the right forum to try the offenses of terrorism and the illegal possession of firearms. On the basis of this ruling, the High Court then issued an order to suspend the actions in the military tribunal and directed that the case be heard in a civilian court beginning March 15. Disregarding the decision, however, the army continued the standoff, claiming that it would not be ordered around by judges and accusing the judiciary of favoring defendants, though it nonetheless postponed proceedings in the military tribunal.[8] The government sought to find a way to get the Constitutional Court to reconsider.

As events unfolded, the Attorney General asked the electoral commission to halt Besigye's nomination as a candidate for president. The commission had earlier granted its permission to proceed with the candidacy, and the Minister of State had concurred, as had some in the Attorney General's office. The Attorney General argued that a conviction on any of the charges brought against him would disqualify the FDC candidate. Two lawyers also allegedly filed a petition to nullify Besigye's nomination on the grounds that he was wrongly nominated as candidate in absentia, but the law firm named in the petition said that in fact it never had filed such and was unaware of the matter. A senior partner said, "This morning, I read in the papers that I have filed a petition against Besigye. I didn't know about it. My [team] went to the Court of Appeal and discovered that there was indeed a petition, but we are not party

[7] *Financial Times*, BBC Monitoring International Reports, December 24, 2005, accessed through LexisNexis.

[8] "Has Army Court Martial Overthrown Constitution," *AllAfrica, Inc/ Uganda Monitor*, February 16, 2006, accessed through LexisNexis. The head of security forces, General David Tinyefuza, allegedly claimed that "the army would not be 'ordered around' by judges."

to it."[9] The court appointed judges to hear the petition as the election date neared. The Law Society denounced the Attorney General for his actions, claiming its members would no longer respect his opinions.

The elections took place on February 23, with one candidate commuting to court for hearings on multiple charges. Besigye lost the race, but by a smaller margin than he had in 2001. He immediately filed charges in the courts against the electoral commission, charging that it had failed to carry out its responsibilities and caused the election to be unfair. Other opposition candidates chose not to protest the handling of the election in the interests of peace. A week after the election took place, with the pressure off, the government announced that it would comply with the Constitutional Court ruling that only the civilian courts could hear the criminal charges against Besigye and others, a decision that coincided with a meeting between the president and ambassadors from the EU and the United States. The court martial continued to hold the twenty-two co-accused defendants, however.

The court hearings on the cases brought by the government and by Besigye proceeded, even as the election results came in. Justice John Katutsi had heard the rape case against Besigye. The rape was alleged to have taken place around October or November 1997. As the proceedings unfolded, however, six government witnesses failed to appear and others appeared only after long delays, the police logbook was found to have been forged, the alleged victim was discovered to be living at State House at the time the charges were made and proved inconsistent on the stand, and one of the witnesses was living in a house provided by a general. At the end of the hearings, Katutsi summed up the case for the assessors and pointed out lies and inconsistencies. The assessors advised acquittal. In his judgment, Katutsi criticized the government for abuse of process. The government filed an appeal, while Besigye sued for wrongful prosecution.

The matter of the treason charges proved more complex. The basis for the accusations were vague and appeared to relate to letters in the possession of a slain Lord's Resistance Army commando that allegedly expressed favorable opinions of Besigye.[10] Besigye's defense lawyers faced off against a team of private lawyers paid by the government and rumored to include assistance from the British law firm of Denton Wilde Sapte. Justice Katutsi, who had heard the rape case, was assigned to hear the treason and arms charges as

[9] "Besigye Case Hits Snag, Court Petition a Forgery," AllAfrica, Inc. *The Monitor*, January 21, 2006, accessed through LexisNexis.

[10] *Financial Times Information*, BBC Monitoring Service. July 8, 2006, accessed through LexisNexis.

well, but as the date approached, in the highly political atmosphere of early February, Katutsi asked to step down. He cited both health reasons and the fact that he hailed from Rukungiri, Besigye's home area, and thought that, to be perceived to be fair, the court should appoint someone else in his stead.[11]

While donor country representatives and even some of the government's ministers pushed the Attorney General to agree not to prosecute, on the grounds that the charges were politically motivated, Besigye's lawyers asked the new justice to throw out the indictment on the grounds it was defective because it failed to disclose sufficient information about the allegations to permit the defendants to prepare their cases. The new judge, Vincent Kagaba, walked a thin line. He ruled that the indictment did disclose sufficient information, though he expressed concern about the underlying statutes, saying, "Unfortunately the court will apply the law as it exists on the statute books now. What the law was or what it should be may be mere wishes, opinion and advice for future improvement."[12] A month later, the judge stayed the court proceedings to give the defense time to challenge the constitutionality of some aspects of the trial. Eventually the judge required the lawyers on both sides to meet with each other and decide on what basis the case could go forward. Although the proceedings continue, it is likely they will end when the government no longer feels it will lose face by backing off. The court returned Besigye's passport, enabling him to travel abroad.

In the matter of Besigye's charges against the election commission, the country's Supreme Court took a decidedly cautious approach, slightly reminiscent of *Marbury*. Besigye claimed a variety of election irregularities: violence against party members and supporters, pre-ticked ballots, and the striking off of supporters from vote registers. He also claimed that the National Resistance Movement was not a registered political party and could not sponsor candidates.[13] In early April, the Supreme Court, sitting en banc, declined 4-3 to annul the election. Instead, it ruled that, yes, the electoral commission had failed to observe the electoral law and there was evidence of malpractice, but, no, the results would not have been substantially different, so no action could be forthcoming. The Court noted that the act of Parliament in question says that the judges must be convinced that the noncompliance with the law affected the result of the election in a substantial manner, and the judges did not so conclude. A disappointed Besigye subsequently hinted that frustrated

[11] "Besigye Judge Quits," AllAfrica, Inc. *The Monitor*, accessed February 4, 2000 through LexisNexis.

[12] AllAfrica, Inc., accessed March 16, 2006, through LexisNexis.

[13] BBC Worldwide Monitoring, accessed March 8, 2006, through LexisNexus.

candidates in future elections might resort to a bush struggle instead.[14] Some members of the court were accused of corruption by Besigye's political party, but the charges were later withdrawn publicly when the accusations were found to be without merit.

By August 2006, lines of fracture within the government had started to appear. Some of those who had objected to the attacks on Besigye received promotions. The Minister of Defence who had lobbed the first attacks lost his portfolio, although he received another, in security. The Attorney General criticized those in his office who had disagreed with him, suggesting that there had indeed been lines of division. The twenty-two co-defendants in the treason case remained in prison despite a court order granting bail, however, implying that the military-AG faction remained at least partly intact. The trial unfolded slowly over succeeding months, during which time the court allowed the government to call witnesses who were self-confessed criminals, an act that elicited the ire of Besigye and the twenty-two co-defendants. Further high-profile attacks on the court were not forthcoming, however, and the court granted Besigye a passport to travel abroad. Although the story continues to unfold and "justice," in the purest sense of the term, was not always done, the courts remained intact, and the main opposition politician remained free to call for sweeping reform of the government and to launch a suit over the management of the central bank.

In this instance, members of the court had used court rules and the rules of criminal and civil procedure to try to negotiate for the independence of the judiciary from the executive branch – giving each side a bit of what it wanted, extending the debate about what constitutes fairness, and ultimately, on key issues, taking a strong stand on the proper relationship among government officers, the court, and the law. They also had taken on more public roles. Several judges had spoken at public meetings about the role of the judiciary and the importance of an independent judiciary. They openly spoke about their willingness to organize a review of their own operations. Supreme Court Judge George Kanyeihamba, whose relationship to Museveni dated to the years before the president's bush struggle, publicly applauded the successes of the government at the same time he criticized those who sought to manipulate situations for their own benefit and pinpointed where he thought the government had erred. He did not mince words when speaking with newly elected members of the National Resistance Movement, Museveni's "party," and the government did not push back hard.

Throughout these events, internal and external pressure groups played an important role. The Uganda Law Society (the bar association) and the Uganda

[14] AllAfrica, Inc. from the *East African* accessed April 11, 2006, through LexisNexus.

Human Rights Commission both issued statements critical of the government throughout the episode, publicized the issues externally, and got people into the streets to demonstrate. The newspapers ran editorials that were reasoned, not shrill, but were nonetheless strongly critical. Although the government imposed bans on coverage at several junctures, several papers kept up the drumbeat in their opinion columns. Another theoretically "independent" body, the Inspector General's office, also began to ask questions in the later phases.

The international community weighed in as well. A group of foreign envoys paid a visit to the court on the day of the first bail hearing. They were prevented from reaching the containment cell by the Black Mambas, but their presence sent a clear signal to the crowd. The Danish ambassador, chief of Uganda's development partners, tried to attend the court martial but was ordered out by the generals. The human rights groups issued reports and monitored events closely. The International Commission of Jurists sent representatives to monitor the trials, creating reputational pressure for the judges and lawyers. By mid-December, the governments of Sweden, the Netherlands, Norway, Ireland, and Britain had cut their bilateral aid programs in protest. Tony Blair spoke publicly against the actions at the opening of the Commonwealth Conference. The EU demanded a fair trial and expressed concern about the charges. The U.S. State Department issued a statement expressing concern about events.

Judicial independence is never won once and for all. It is constantly renegotiated. In the first quarter of 2007, two years after the initial incident that touched off Uganda's separation of powers crisis, the court martial reasserted its authority to try the accused, although it excluded Besigye himself. The Constitutional Court reiterated its holding that the military had no jurisdiction. Security forces once again swept into the High Court to prevent some of the men arrested three years earlier from accepting a grant of bail. A group of armed commandos entered the High Court and re-arrested the accused. An investigative team from the International Bar Association, which visited the country some months later, reported that the executive had started to infringe judicial independence in other ways as well, including refusal to abide by court orders, increasing personal criticism of particular judges, failure to appoint senior judges and consequent interference with the appeals process, deliberate under-funding of the judiciary, and use of military courts to hear cases against civilians accused of illegal weapons possession. (International Bar Association 2007)

The government's actions met with a response. The Uganda Law Society issued a statement that rebuked the government and suspended the membership of the Attorney General, the Director of Public Prosecutions, and

several other officials for a six-month period. Several senior judges decried the government's actions as well, and the judges and lawyers joined in a one-week strike, although they later apologized to the country for this gesture of protest. In June, the donor community asked the government for assurances that it would desist from further efforts to undermine the courts and donors announced a significant contribution to the judiciary improve the ability of the courts to carry out their work. Judges and lawyers continued to articulate their concerns in public over the following months.

By January 2008, it remained unclear whether the government would take further action against the courts, or whether it would agree to improve respect for the separation of powers. It took no definitive measures against particular judges it considered unfavorable, however, and it did not urge a general uprising against the courts, a step Robert Mugabe pursued in Zimbabwe. Although politics entered the selection of new judges, there were no full-scale efforts to oust those already in office. At the same time, some judges reported pressure to decide cases in favor of the government, and the president and his associates insisted that the courts had no authority to adjudicate matters that were part of a broad reading of executive powers. Again, for at least a brief period, a fragile entente appeared to set in. In local newspapers, a few citizens began to wonder in print whether the courts were being asked to do too much, to carry responsibility for the country's fate when the separation of powers ought more reasonably to be preserved by actions of parliament and of opposition politicians, who clearly had a stake in preventing executive abuse of authority and had a greater ability to speak out.

Zimbabwe: Unhappy Outcomes

In 2000, the judiciary in Zimbabwe had an especially strong reputation for independence on the African continent. A series of impressive judges had led the court; some were non-African citizens of Zimbabwe, and some, like Enoch Dumbetshena, were important Zimbabwean insiders. The court had stood firm in the face of executive branch resistance on a variety of issues, from suspension of habeas corpus (ruled out) and reasonable time to trial to freedom of speech. Members of the public had come out on the streets in support of the courts when the government sought to interfere with their operation. However, chief justices in neighboring countries occasionally expressed worry that their Zimbabwe counterparts were too public, too visible – that they provoked the ire of the executive and would eventually find themselves closed down. They knew too well the difficulty of dealing with authorities unversed in law who were often highly self-interested and very intolerant of criticism.